CASE NO. 80-5302

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

WILLIAM HOWELL,
Appellant,

v.

COSHOCTON COUNTY CHILDRENS SERVICES BOARD,
Appellee.

APPEAL FROM SUPREME COURT OF OHIO

MOTION TO DISMISS

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Appellee, pursuant to Rule 16 (1) (b) of the Rules of the Supreme Court of the United States, moves the Court to dismiss the appeal herein for the reasons that the judgment rests on an adequate non-federal basis and that the appeal does not present a substantial federal question.

STATEMENT

This is an appeal from an order dated August 9, 1979, of the Coshocton County, Ohio, Juvenile Court which granted the appellee permanent custody of the appellant's daughter, Mary Evelyn Howell. This is a direct appeal of a judgment of the Ohio Supreme Court entered May 29, 1980, denying the appellant's motion to certify the record to review the Fifth District Court of Appeals' affirmance of the Juvenile Court's order. The facts underlying the appeal are as follows:

On September 23, 1971, Mary Evelyn Howell was born to William and Mary Howell. Until February of 1976, Mary Evelyn Howell lived a sparse and nomadic life with her parents; however, no social agencies were contacted or requested to intervene. In February of 1976, Mary Evelyn Howell's father, William Howell, shot and killed her mother. Criminal prosecution was commenced and William Howell was incarcerated in the Coshocton County Justice Center.

Mary Evelyn Howell resided with her maternal grandparents, Leona Almack and James Almack, for a short time following her mother's death and her father's incarceration. Coshocton County Children Services were brought into the case and Juvenile Court proceedings were initiated. On April 12, 1976, the Coshocton County Juvenile Court granted temporary custody of Mary Evelyn Howell to the Coshocton County Children Services Bureau.

In June of 1976, William Howell plead guilty to voluntary manslaughter and was sentenced to serve 7 to 25 years in the Ohio State Reformatory.

It soon became apparent that Mary Evelyn Howell had some severe emotional problems which created difficulties in her foster placements and in her schooling. A course of psychological counseling was undertaken for Mary Evelyn Howell by Dr. Susan Taub, child psychologist. It was apparent that Mary Evelyn Howell was suffering severe emotional stress as a result of the circumstances surrounding her mother's death. It was further concluded that inadequate parenting during the child's early years was also a contributing or primary factor causing Mary Evelyn Howell to function at emotional, social and educational levels considerably below her chronological age and intellectual potential. It was concluded that Mary Evelyn Howell was in dire need of a stable family environment.

STATEMENT OF THE CASE

On May 2, 1977, Coshocton County Children Services filed a motion to change their temporary custody of Mary Evelyn Howell to permanent custody so that she could be placed for adoption. Mary Evelyn Howell's father, William Howell, though still incarcerated, opposed said motion. An adjudicatory hearing before His Honor Judge Richard Evans and a dispositional hearing, each of which was

attended by William Howell, were held on May 24, 1978. Mary Evelyn Howell was found to be a dependent child and permanent custody was awarded to the Coshocton County Children Services Bureau. After a motion for findings of fact and conclusions of law, William Howell appealed this decision of the Court. The Fifth District Court of Appeals on March 19, 1979, reversed the Coshocton County Juvenile Court, finding sua sponte that the Court had not given William Howell proper notice pursuant to Rule 15 of the Ohio Rules of Juvenile Procedure.

On April 23, 1979, a new complaint was filed by the Coshocton County Children Services Bureau again alleging dependency under Section 2151. 04(A) and (C) R..C. Judge Holland Gary from Muskingum County was appointed to hear the case and the adjudicatory hearing was scheduled for July 5, 1979. Appellant, William Howell, filed motions in the Court to strike Count 2 of the complaint and for the appointment of a psychiatrist at State expense to examine William Howell and Mary Evelyn Howell. Said motions were denied by Judgement Entry filed for record on July 5, 1979, however, appellant William Howell's oral motion for a continuance to obtain psychiatric testing of himself and Mary Evelyn Howell at his expense was granted. The adjudicatory hearing was rescheduled for August 2, 1979.

On August 2, 1979, an adjudicatory hearing was held in which testimony was offered by both parties. At the conclusion of the adjudicatory hearing the Court found Mary Evelyn Howell, by clear and convincing evidence, to be a dependent child pursuant to both Section 2151.04(A) R.C. and Section 2151.04(C) R.C. A dispositional hearing was then held and additional testimony was presented by appellant, William Howell. At the conclusion of the dispositional hearing, the Court found that an award of permanent custody to the Coshocton County Children Services Bureau was in the best interests of Mary Evelyn Howell (Judgment Entry, 8/9/79. Appellant's brief Appendix B.)

William Howell again appealed the decision of the Coshocton County Juvenile Court and that decision was upheld by the Fifth District Court of Appeals in a decision filed January 31, 1980.

On February 26, 1980, appellant filed a notice of appeal together with a motion to certify the record to the Supreme Court of the State of Ohio. After considering memorandums in support and in opposition to jurisdiction the Supreme Court of Ohio by order dated May 29, 1980, overruled appellant's motion to certify the record upon the basis that no substantial constitutional question existed. Appellant now takes direct appeal to the United States Supreme Court.

ARGUMENT

In the instant appeal the appellant asks the Court to rule on the constitutionality of Section 2151.04(C) of the Ohio Revised Code which provides that a dependent child is any child:

> (C) "Whose condition or environment is such as to warrant the State, in the interests of the child, in assuming his guardianship."

Appellee submits that such a ruling by this Court would not be dispositive of this case since dependency was also found to exist under Section 2151.04 (A) of the Ohio Revised Code which provides that a dependent child includes any child.:

> (A) "Who is homeless or destitute or without proper care of support, through no fault of his parents, guardian, or custodian;"

The appellant in his petition has not attacked nor raised any issue as to the validity of the latter statute and the judgments of the State courts in the instant case therefor rest on an adequate, alternate, non-federal basis. A ruling

on the issue raised by the appellant would serve as little more than an advisory opinion.

The appellee further moves the Court to dismiss upon the basis that the appellant has failed to raise a substantial federal question. The appellant raises the issue of whether Section 2151.04(C) of the Ohio Revised Code is unconstitutionally vague or overbroad. It is fundamental that to pass on such issue this Court must consider the statute *in pari-materia* with related statutes and must further consider limiting constructions imposed upon the statute by the Ohio courts.

It is submitted that the appellant in the instant case has erected and attacked a "straw man". Virtually every legal issue raised by the appellant has already been ruled upon in his favor by virtue of other Ohio statutues or court decisions.

At Page 6 of the appellant's statement in support of jurisdiction he asks this Court to adopt the compelling interest analysis in considering termination of parental rights and states the following:

> "The significance of adopting the 'compelling' interest analysis is great. If this analysis is adopted by this Court, then parents who are faced with termination of their parental rights, a grievous personal loss, will be afforded many substantive and procedural safeguards not presently afforded ordinary civil litigants. These parents could then be given counsel if indigent, transcripts on appeal if indigent, and would be given greater protection from erroneous deprivations by requiring proof by clear and convincing evidence . . ."

The compelling state interest requirement has already been adopted in Ohio, *State ex rel. Heller v. Miller,* 61 Ohio St. 2d 6, 399 N.E. 2d 66 (1980). The appellant himself cites this case as controlling in Ohio and as requiring a

compelling interest prior to termination of parental rights in Ohio. He appears to be asking this Court to order what has already been ordered under Ohio law.

The appointment of counsel and free transcripts on appeal for indigents are also already provided under Ohio law, *State ex rel. Heller v. Miller,* supra; Rule 4 of the Ohio Rules of Juvenile Procedure which provides that:

> "Every party shall have the right to be represented by counsel and every child, parent, custodian or other person in loco parentis the right to appointment of counsel if indigent . . ."

Proof by clear and convincing evidence is also already required under Ohio Law. Juvenile Rule 29 of the Ohio Rules of Juvenile Procedure provides as follows:

> "If a party denies the allegations, the court shall:
>
> * * *
>
> (4) determine the issue by proof beyond a reasonable doubt in juvenile traffic offense, delinquency and unruly proceedings, by clear and convincing evidence in dependency, neglect and child abuse proceedings, and by a preponderance of the evidence in all other cases."

At Page 13 he argues that parents must receive notice of prohibited conduct and an opportunity to correct it. This is also already provided under Ohio law.

Section 2151.27 of the Ohio Revised Code provides in pertinent part that:

> ". . . complaint may be upon information and belief, and in addition to the allegations that the child is . . . dependent . . . the complaint must allege the particular facts upon which the allegation of . . . dependency . . . is based.;;

This statute together with Section 2151.04 (C) of the Ohio Revised Code was considered by the Ohio Supreme Court case of *In Re Hunt,* 26 Ohio St. 2d 378, 348 N.E. 2d 727 (1976) when the Court stated the following in the first

paragraph of its syllabus:

> "Complaint under Juvenile Rule 10, and R.C. 2151.27 alleging that a child is dependent must state the essential facts which bring the proceeding within the jurisdiction of the Court."

Although appellee does not concede that an opportunity to correct the complaints must always be given to insure constitutionality, it is clear that since, in Ohio, the dependency is determined as of the date of the final adjudicatory hearing, the parents are in fact given an opportunity to rectify the specifics of the complaint when this can be done, *In Re Justice,* 59 Ohio App. 2d 78 (1978).

Finally, appellant also argues the statute should be struck down because there is potential for abuse of discretion by trial judges. He states the following at Page 11 of his petition:

> "The Ohio statute allows the Juvenile Court to determine when the environment of a child warrants intervention. Accordingly, the juvenile judge is free to remove any child who lives in submarginal home. This, of course, means that the poor parent and the handicapped parent are more likely to suffer from the coersive intervention of the State than is the middle or upper class parent. Furthermore, there is a significant possibility of erratic adjudications existing within the previously defined sub-classes."

The appellant goes on to quote from the Ohio case of *In Re Konniker,* 30 Ohio App. 502 (1929), as ostensibly containing dictum as to what the law of Ohio should be. This argument does not rise to constitutional standards. Many, many statutes provide for discretionary decisions by the judiciary. The trial court's exercise of discretion is reviewable by superior courts. Such discretion justly permits the courts to consider each case on its individual

facts and merits, both mitigating and aggravating. It is beyond argument that justice in human affairs is not amenable to mathematical formulas. The appellant has shown no abuse of discretion in the instant case, nor has he shown any overall pattern of such abuse in the court decisions in the State of Ohio. The discretion of the Courts has been limited and is not unbridled. The Court of Appeals in Clinton County, Ohio, in the case of *In Re Justice,* 59 Ohio App 2d 78 (1978), construing Section 2151.04(C) of the Ohio Revised Code and the permanent removal standards of Ohio law states the following by footnote at Page 83 of its opinion:

> "R.C. 2151.04(C) is not to be so broadly interpreted as to permit any child to be permanently removed from its natural parents simply because the court determines the child may be better off with someone else. It must be construed, as we construe it here, to cover the situation where a return of the child to the parents would be clearly detrimental to said child. Furthermore, the importance to a child of living with its natural parents is a factor to be weighed in determining what is or is not detrimental. (citing In Re Perales, 52 Ohio St. 2d 89 [1977] by analogy)"

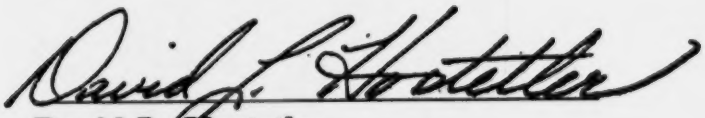
CONCLUSION

A statute lawfully enacted by the legislative branch of the government is presumed to be constitutional, *Davies Warehouse Company v. Bowles,* 321 U.S. 144 (1974), it must be construed in a manner favoring constitutionality unless no other reasonable construction can be supported, *Bauman v. Ross,* 167 U.S. 548 (1896). Considered in the context of related Ohio statutes and as applied by Ohio case law, it is clear that Section 2151.04(C) is not unconstitutional. This Court has held that "facial

overbreadth has not been invoked when a limiting construction has been or could be placed on the statute, *Broadrick v. Oklahoma,* 414 U.S. 601 (1973).

A consideration of the issues raised by the appellant would not change the outcome of the instant case since dependency was also found under Section 2151.04(A) of the Ohio Revised Code and would not substantially change the present law in the State of Ohio. Appellee, therefor, respectfully requests this Court to dismiss this appeal on the ground that the judgment rests on an adequate non-federal basis and upon the further grounds that the appeal does not present a substantial federal question.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion to Dismiss was served upon the Counsel for Appellant, Edward Emmett O'Farrell, Esquire, Southeastern Ohio Legal Services, Tuscarawas Valley Area Office, 131 Fair Avenue, N.E., New Philadelphia, Ohio 44663 and upon the Guardian Ad Litem Attorney Norman S. Davitt, 528½ Main Street, Coshocton, Ohio 43812 by United Stated Regular Mail this 6th day of October, 1980.

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